Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PAUL L. GLOVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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I

Respondent United States concedes that the Seventh Circuit was incorrect to require that a Section 2255 petitioner demonstrate a "significant" increase in his sentence to satisfy the prejudice prong of the test for establishing ineffective assistance of counsel. The Government agrees with Mr. Glover that there is no basis for adding a "significant" prejudice requirement to the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, the Government also agrees with Mr. Glover concerning the only issue raised by his petition to this Court—that the district court and court of appeals erred below in dismissing petitioner's Section 2255 motion on the grounds that 6 to 21 additional months in prison was not "sufficiently significant" to establish prejudice under the ineffective assistance of counsel standard. *See* Resp. Br. 7-9, 11-23.

Although the Government acknowledges the error in the proceedings below, it now argues for affirmance based on a variety of new and different grounds. The Government asserts that this Section 2255 action should be dismissed because petitioner fails the "deficient performance" prong of *Strickland* and that Mr. Glover was not actually prejudiced by his counsel's performance. Yet, these arguments were never raised by the Government in the court of appeals. In addition, the district court and the court of appeals never addressed these grounds for affirmance. These new Government arguments also are not encompassed within the questions on which this Court granted certiorari. Moreover, the Government's new arguments involve complicated issues of interpreting Seventh Circuit and Sentencing Guidelines law which are better left for the lower courts in the first instance. Accordingly, this Court should reverse based on the Government's confession of error relating to the Seventh Circuit's "significant" prejudice requirement and remand the case for the lower courts to address the Government's new arguments for affirmance.

Furthermore, even were this Court to disregard its own rules and procedures and choose to reach the Government's new arguments, it should conclude that they lack merit. The Government's argument regarding performance should be rejected because Glover's counsel was plainly deficient in failing to assert case law to the district court supporting grouping kickback and money laundering offenses under the Sentencing Guidelines and in failing to urge this grouping issue on appeal. In addition, his counsel's failure to bring the controlling case of *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), to the attention of the court of appeals clearly fell below any objective standard of reasonableness. The Government's new arguments regarding the prejudice prong also should be rejected. The Government's argument that this Court should overrule *Wilson* is without force and contrary to a sound interpretation of the Sentencing Guidelines. Furthermore, the Government's new theory that application of the *Wilson* decision would lead to an increase in Mr. Glover's sentence was rejected in a subsequent Seventh Circuit decision, *United States v. Wilson*, 131 F.3d 1250 (7th Cir. 1997) ("*Wilson II*").

II

A. The Government Agrees That The Seventh Circuit's Requirement Of "Significant" Prejudice Is Constitutionally Insupportable And That 6 To 21 Additional Months Imprisonment Caused By Counsel's Ineffective Assistance Satisfies The *Strickland* Prejudice Test

The Government now states that the court of appeals "erred in holding that a defendant could show 'prejudice' for an ineffective assistance of counsel claim only if, but for counsel's error, the defendant would have received a 'significant' sentencing reduction." Resp. Br. 8. As the Government notes, the Seventh Circuit incorrectly relied on this Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), which the circuit court understood to modify the

Strickland prejudice analysis[1] by requiring a fundamentally unfair or unreliable result (*i.e.*, a significantly longer sentence). This Court recently rejected that understanding of *Lockhart*, explaining in *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000), that *Lockhart* "do[es] not justify a departure from straightforward application of *Strickland*." *See* Resp. Br. 8-9, 18-20. The Government also concludes that the Seventh Circuit's test has proved "unworkable," with "no clear or principled lines" for determining when an undeserved imprisonment due to counsel's error is "significant." Resp. Br. 9, 21-22. Thus, as the analysis set forth by the Government confirms, the Seventh Circuit's "significant" prejudice test cannot be justified and should be overturned.

The parties therefore agree that the court of appeals erred in dismissing Mr. Glover's Section 2255 motion on the ground that 6 to 21 additional months in prison was not sufficiently "significant" to demonstrate the requisite prejudice. As discussed in the next section, this "significant" prejudice test was the sole basis for the decisions of the district court and court of appeals and the sole issue presented in the petition for certiorari to this Court. Accordingly, if the Court agrees with the parties that the Seventh Circuit committed error in its application of a "significant" prejudice test, this Court should reverse and remand for the court of appeals to address, as it deems appropriate, the additional grounds for dismissal of the Section 2255 action that the Government now seeks to assert.

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[1] *Strickland* provides that a defendant satisfies the prejudice prong of the ineffectiveness test where he shows a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

B. This Court Should Remand To The Lower Courts To Consider The Government's New Arguments, Which Were Not Raised Below, Addressed By The Courts Below, Or Encompassed Within The Question Presented By The Petition For Certiorari

The Government offers a potpourri of new grounds for affirming the court of appeals' dismissal of Mr. Glover's Section 2255 motion. Resp. Br. 25-48. First, the Government maintains that Mr. Glover's counsel did not perform ineffectively in violation of the "deficient performance" prong of *Strickland*. The Government contends that Mr. Glover's counsel performed reasonably and competently when he did not present written argument or case law supporting the grouping of kickback and money laundering offenses to the district court and did not urge this grouping issue in the appeal to the circuit court. Second, the Government argues that counsel's failure to assert the controlling decision of *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), was not prejudicial because this Court should overrule *Wilson*'s holding concerning the grouping together of kickback and money laundering offenses under Sentencing Guidelines § 3D1.2. Lastly, the Government contends that Mr. Glover cannot demonstrate prejudice because, even under *Wilson*, if one "properly" recalculates Glover's sentence under the Sentencing Guidelines, the sentence would be longer than the 84 months that Mr. Glover received.

None of these assorted arguments for affirmance are properly before this Court. They were not raised below, addressed below, or presented by the petition for certiorari. Accordingly, under the well-established practices of this Court, this case should be remanded to allow the parties the opportunity to more fully brief these issues and to allow the lower courts to interpret their own precedent as applied to the specific facts of this case.

1. *Government Arguments Below.* In connection with the instant Section 2255 action, the Government never argued any of these alternative grounds in the court of appeals.[2] Nowhere in its brief to the Seventh Circuit did the Government contend that Mr. Glover could not satisfy the first prong of *Strickland* because his counsel did not perform deficiently. Nowhere did the Government contend that the Seventh Circuit had wrongly decided *Wilson* and should revisit that precedent. Nowhere did the Government contend that Mr. Glover would have received an even greater sentence had he prevailed on the grouping issue. Rather, the United States argued only one ground to the court of appeals — that Mr. Glover's claim of a two-offense level change, or 6 to 21 additional months in prison, failed to satisfy the "significant" prejudice requirement established by the Seventh Circuit.[3]

2. *Decisions Below.* Not surprisingly in light of the single argument put forward by the Government, the court of appeals relied on the "significant" prejudice test and did not address any other grounds for affirmance. The district court likewise had not reached any other arguments relating to Mr. Glover's Section 2255 motion. Instead, both courts dismissed the Section 2255 motion on the single ground that Mr. Glover could not satisfy the prejudice prong of *Strickland* because 6 to 21 additional months in prison caused by counsel's ineffectiveness was not sufficiently "significant" under Seventh Circuit law. These lower courts concluded that Mr. Glover failed the "significant" prejudice standard of the

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[2] A copy of the Brief of the United States, *Glover v. United States*, 182 F.3d 921 (7th Cir. 1999) (No. 98-4021) is attached as Appendix A to this Reply Brief.

[3] Thus, the Government characterized the issue for appeal as "[w]hether the potential effect on Glover's sentence of his attorneys' claimed deficient performance can satisfy the prejudice component of an ineffective assistance of counsel claim." Brief of United States, filed February 23, 1999, at 1 (Appendix A, at 6a).

Seventh Circuit, and therefore they did not find it necessary to reach any other grounds. J.A. 53 ("Even if we were to assume that Glover's attorneys performed inadequately, the second prong, prejudice, is missing here."); J.A. 45 ("Because it is held that Glover does not satisfy the prejudice requirement, it is unnecessary to consider the issue of deficient performance.").

3. *Petition for Certiorari.* Because the decisions of both the court of appeals and district court relied solely on the "significant" prejudice standard adopted by the Seventh Circuit, and because this was the only ground argued by the Government in the appeals court, Mr. Glover's petition for certiorari focused solely on this "significant" prejudice issue. Petitioner's "Question Presented" addressed only whether an additional 6 to 21 months in prison was "insufficient to satisfy the 'prejudice' prong of *Strickland v. Washington*." Petition for a Writ of Certiorari, at i. Thus, the petition was aimed at the single issue—the correctness of the Seventh Circuit's "significant" prejudice standard. Petitioner argued that this "significant" prejudice standard was contrary to Supreme Court precedent, conflicted with decisions from other circuit courts, led to arbitrary and inconsistent results, and presented an issue of recurring importance.

Unfortunately, unlike its more forthright brief on the merits, the Government declined to confess error in opposing certiorari. In its brief in opposition, the Government argued that Mr. Glover's case did not warrant review because there was no split of authority among the circuit courts relating to the "significant" prejudice requirement. Brief of United States, filed May 22, 2000, at 10-13. The Government also argued that the Seventh Circuit's "significant" prejudice test was not inconsistent with Sixth Amendment cases such as *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). *Id.* at 10 n.4. In addition, the Government argued that the grant of certiorari was "premature" in light of more recent Fifth Circuit and

Supreme Court decisions discussing the prejudice standard. *Id.* at 14. Although the Government contended that certiorari should be denied because Mr. Glover's counsel had not been deficient in failing to anticipate *Wilson*, *id.* at 7-9, the Government never argued that *Wilson* should be overruled or that Mr. Glover would suffer an increase in his prison sentence if he prevailed on the grouping issue.

4. *Application of Supreme Court Precedent.* In these circumstances, this Court's procedures and practices provide that the Court should not reach the Government's sundry new grounds for affirmance but should remand them for consideration by the lower courts. Supreme Court Rule 14.1(a) states that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court,"[4] and Rule 24.1(a) notes that a brief on the merits should not "raise additional questions or change the substance of the questions already presented" in the petition. It also is well settled that "ordinarily this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (same); *see Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Holly Farms Corp. v. Nat'l Labor Relations Bd*, 517 U.S. 392, 400 n.7 (1996) ("We 'generally do not address arguments that were not the basis for the decision below.'"); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but "not raised in court of appeals is not properly before us"); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in

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[4] "[I]t is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented . . . ." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993).

exceptional cases will this Court review a question not raised in the court below."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). *See also* Stern, Gressman, Shapiro, & Geller, *Supreme Court Practice* (7th ed. 1993), at § 6.26 (and cases cited therein).

Adherence to these rules precluding a respondent from arguing issues which were not presented or decided below or identified by the petition is important "to maintain[ing] the integrity of the process of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. at 646. As this Court observed:

> The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system.

Id. In addition, injecting new issues into the case at this stage deprives this Court of the benefit of the lower court's refinement and resolution of such issues. *See* Stern, *et al.*, *Supreme Court Practice*, at 343.[5]

This case does not present any exceptional circumstances which justify diverging from this Court's established practice of remanding newly raised issues to the lower courts. Rather, the Government's arguments turn on interpretations of Seventh Circuit law, as well as the application of this circuit law to the specific facts of this case.

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[5] "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See also Microsoft Corp. v. United States*, No. 00-139 & 00-261, 2000 WL 1052937 (U.S. Sept. 26, 2000) ("A court of appeals proceeding would likely narrow, focus, and initially decide the legal issues now presented here. It would thereby facilitate any later deliberation in this Court.") (Breyer, J., dissenting from denial of direct appeal).

The Government, for example, argues that petitioner's counsel acted reasonably because the grouping issue under § 3D1.2 was not a "clearly stronger" appellate issue than the two issues raised by his counsel on appeal. Resp. Br. 31-32. The comparison of the relative strengths of these appellate issues—which include evidentiary rulings and factual determinations—requires a detailed analysis of governing Seventh Circuit law as well as the relevant facts and rulings in the district court. Similarly, the Government contends that Mr. Glover's counsel was precluded from bringing the controlling decision of *United States v. Wilson*, 98 F.3d 281 (1996), to the Seventh Circuit's attention even though the panel had not yet ruled on Mr. Glover's appeal. This contention involves a quintessential question of the Seventh Circuit's practice which should be left to that court in the first instance. Likewise, the Government alleges that Mr. Glover would be resentenced to an even greater term of imprisonment if the kickback and money laundering offenses were grouped together under *Wilson*. This charge involves not only an elaborate application of the Sentencing Guidelines to Mr. Glover's specific facts, but runs directly counter to the court of appeals' decision in *Wilson II*, 131 F.3d at 1253-54, which held that the Government waives these very arguments by failing to raise them at the original sentencing. Again, the district court and court of appeals are best situated to address these issues of circuit law as applied to Mr. Glover's case.

That this case involves interpretation and application of the Sentencing Guidelines also counsels for remanding the Government's new arguments to the lower courts. This Court has previously recognized that the district courts are in the best position to apply the Sentencing Guidelines to the facts of an individual case. *See Koon v. United States*, 518 U.S. 81 (1996) (adopting abuse of discretion standard for appellate review). This Court also has noted that it should be "restrained and circumspect in using [ ] certiorari power as the primary means of resolving" conflicts on Sentencing

Guidelines interpretation because Congress expressly contemplated that the Sentencing Commission would revise the Guidelines to clarify any conflicting judicial decisions. *Braxton v. United States*, 500 U.S. 344, 348 (1991). In fact, the Sentencing Commission has identified the very grouping issue that the Government urges this Court to review here as one of its policy priorities for clarification in the coming year. 65 Fed. Reg. 50,034 (Aug. 16, 2000) (the Commission's "priorities . . . [for] possible amendments to the guidelines, policy statements, and commentary" include "(ix) [w]hether money laundering and fraud convictions should be grouped together for sentencing under § 3D1.2"). The Government has frequently maintained that, pursuant to *Braxton*, this Court should not review issues relating to interpreting the Sentencing Guidelines.[6] It, therefore, is inappropriate that, after certiorari is granted, the Government for the first time seeks review of *Wilson* and proposes resentencing calculations by this Court. *See Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . .").

The Government has no legitimate excuse for its failure to raise these new arguments for affirmance in the court below.[7]

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[6] *See, e.g.*, Brief of the United States in Opposition to Certiorari at 13, *Riley v. United States*, filed February 17, 2000 (No. 99-920) ("As this Court explained in *Braxton v. United States*, 500 U.S. 344 (1991), conflicts among the court of appeals regarding interpretation of the Sentencing Guidelines generally do not warrant plenary review by this Court. Rather, resolution of such conflicts is best reserved for the Sentencing Commission . . .").

[7] The Government justifies its failure to raise these new arguments in the court of appeals by noting that "the district court's ruling addressed only prejudice." Resp. Br. 24, n.10. The Government also argues in a footnote that its new arguments are nevertheless properly before the Court because they involve the "unitary claim of ineffective assistance of counsel." *Id.* Yet, surely if Mr. Glover were to raise new arguments for why his counsel had been ineffective—*e.g.*, that his lawyer had not objected to a certain jury instruction at trial and had not urged this jury instruction issue on appeal—the Government would not consider this part of a "unitary claim" but instead would adamantly insist that this Court should not consider these new, never-previously-asserted arguments. The United States should not be permitted to escape its failure to raise arguments below by simply rewriting petitioner's certiorari questions using overly broad and inapt general terms.

It has offered no persuasive reason for why this Court should wade into the morass of the Government's complicated new arguments relating to circuit law and the Sentencing Guidelines. The better course here is for this Court to follow its usual procedures: in light of the Government's confession of error on the issue relied on below and raised in the petition for certiorari—the "significant" prejudice standard—this Court should reverse and remand the case to the court of appeals. The lower courts can then determine whether the Government's new arguments have been properly preserved

The cases cited by the Government in support of its view do not argue to the contrary. Resp. Br. 24, n.10. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379-80 (1995), the Court found it appropriate to address petitioner's new argument because it "was addressed by the court below" and "fairly embraced within the question set forth in the petition for certiorari." Neither of these elements is present in the instant case. *Lebron* (and the Government) quotes *Yee v. City of Escondido*, 503 U.S. 519 (1992), a case where this Court refused to reach an "important" argument because it was not encompassed by the petition for certiorari and petitioners could not overcome the "heavy presumption" against addressing such a new argument. The Government's citation to *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), also is unavailing. In *Capital Cities*, the issue considered by the Court had been acknowledged by both the district court and court of appeals, the district court had made findings on all factual issues necessary to resolve the question, and the parties had briefed and argued the question pursuant to an order of the Court. *Id.* at 697.

and, if so, whether these arguments warrant dismissal of the Section 2255 motion.[8]

C. Should This Court Review The Government's New Arguments, It Will Find Them Without Merit.

As discussed above, the Government's new arguments should be addressed by the lower courts in the first instance. Nevertheless, even were this Court to review them, it should find these eleventh-hour Government contentions cannot survive scrutiny.[9]

1. *Deficient Performance Argument.* The Government now asserts that petitioner's counsel did not perform deficiently in the district court and court of appeals because he could not be "clairvoyant and foresee that the Seventh Circuit . . . would adopt a position on grouping favorable to the defense." Resp. Br. 10, 29-34. The Government characterizes the actions of Mr. Glover's counsel as simply a "reasonable tactical decision." *Id.* at 34. The Government, however, fundamentally misapprehends the factual and legal background relating to the grouping issue in Mr. Glover's case.

8

> [Respondent] raised this argument for the first time in its brief in opposition to the petition for writ of certiorari. It was not argued to either of the lower courts, and was not considered by either court below in deciding this case. The issue was not raised by ACCA in its petition for writ of certiorari, nor is it encompassed by the questions presented upon which we based our grant of certiorari. Consequently, we decline to decide [this issue].

Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 522-23 (1991).

[9] It should be noted that, because the Government waited until the opposition brief on the merits before this Court, Mr. Glover is constrained by time and space limitations in responding to the Government's various new arguments. These limitations also preclude effective participation of possible amici curiae who might wish to contribute to the Court's consideration of these issues.

Mr. Glover's counsel clearly performed below the professional norm during the district court sentencing process when he failed to file a written response to the Government's position paper[10] and failed to bring to the district court's attention any of the case law supporting the grouping of kickback and money laundering counts under Guidelines § 3D1.2. At the time of the sentencing, several circuit courts had already held that money laundering and fraud activities should be grouped together under the provisions of Guidelines § 3D1.2.[11] Yet, Mr. Glover's counsel never apprised the district court of these cases or their reasoning supporting the grouping of kickback and money laundering offenses.

The Government now asserts that Mr. Glover's counsel never submitted a written response or asserted this case law because of counsel's alleged fears that Mr. Glover would receive an even longer sentence if these offenses were grouped. However, there is no factual support for this Government contention. In the proceedings before the district court, the United States never hinted at a longer sentence, never mentioning any such possibility in its filed position paper or its statements at the sentencing hearing. The Government never challenged, as it was required to do, *see Wilson II*, 131 F.3d at 1250, the value of funds used in the probation office's presentence report for calculating the

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[10] The United States Probation Office made a recommendation in favor of grouping the kickback and money laundering counts pursuant to Sentencing Guidelines § 3D1.2. J.A. 70-71. The Government submitted a written position paper objecting to this grouping recommendations. Mr. Glover's counsel filed no pleadings supporting the presentence report or opposing the Government's position paper.

[11] *See United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995); *United States v. Cusumano*, 943 F.2d 305 (3d Cir. 1991); *cf. United States v. Massey*, 48 F.3d 1560, 1568 (10th Cir. 1995) (noting district court's grouping of money laundering and fraud offenses).

offense level with the offenses grouped. Moreover, Mr. Glover's counsel did argue for grouping during the sentencing hearing, albeit weakly and orally only, and without citation to the supporting case law or reference to the reasoning therein. The Government's position now appears to be, in essence, that petitioner's counsel made a "tactical decision" to present a grouping argument but to do so in a haphazard, incompetent fashion. Such a strategy could hardly be deemed "reasonable." A more likely explanation is that Mr. Glover's counsel had not done any research or preparation, had not identified the cases in other circuits supporting grouping, and, consequently, argued inadequately when asked by the district judge to address the Government's objection to grouping the offenses.

There also is no factual basis for the Government's contention that his counsel made a "reasonable tactical decision" to not assert the grouping issue on appeal.[12] The report of the Probation Office had recommended grouping. Along with the several circuit court decisions which Glover's counsel failed to raise at the district court level, an additional court of appeals had found in favor of grouping money laundering and fraud under § 3D1.2 by the time of Mr. Glover's appeal. *See United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995); *United States v. Adams*, 74 F.3d 1093, 1102 n.12 (11th Cir. 1996). Although the Seventh Circuit had not yet addressed the issue, there was a reasonable likelihood that

[12] At the very least, Mr. Glover is entitled to an evidentiary hearing in the district court to determine if this was truly a tactical decision or whether, as petitioner alleges in his Section 2255 motion, counsel never researched any of the precedent relating to the grouping issue and never was aware of the *Wilson* decision. *See* 28 U.S.C. § 2255 (evidentiary hearing should occur unless "the motion and the files and records of the case *conclusively* show that the [petitioner] is entitled to no relief") (emphasis added); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam).

the Seventh Circuit would join the other circuit courts which had concluded that money laundering, when engaged in as part of an effort to conceal an illegal kickback scheme, should be grouped with the kickback offenses under § 3D1.2.

Contrary to the Government's assertion, this grouping issue was a clearly stronger argument than the two claims that Mr. Glover's counsel did assert on appeal. His counsel maintained that the trial judge erroneously refused to admit all of Mr. Glover's testimony from his first trial for clarification purposes. The entirety of this testimony comprised 168 pages. The court of appeals found that Mr. Glover could not demonstrate "the threshold criteria" of relevance for all of Glover's testimony and did not even remotely approach the "abuse of discretion" that he was required to show. J.A. 144-45 (listing numerous reasons why court found this claim to be "wholly unfounded").

Glover's counsel also challenged on appeal the 2-offense level obstruction enhancement that Mr. Glover received for committing perjury at his first trial. This appellate claim, however, had no support in the presentence report, required Mr. Glover to prove that the district judge's factual determination was "clear error," and challenged four specific factual findings by the judge of false statements by Mr. Glover under oath. J.A. 137-138, 145-147. Unlike the grouping issue which prevailed in *Wilson*, the Seventh Circuit easily rejected counsel's perjury arguments. J.A. 147 ("In making these findings [of perjury], the judge has complied in every respect with the [enhancement] requirements [and] we discern no error, clear or otherwise in the judge's factual determinations. . . . [T]his is plainly not a close call.'"). There can be no doubt that the grouping issue was far superior to the claims actually urged by counsel.[13]

[13] The circumstances surrounding counsel's actions on appeal call into serious question his diligence and commitment to Mr. Glover's case.

Furthermore, petitioner's counsel did not act reasonably when he failed to bring the *Wilson* decision to the panel's attention. *Wilson* was on all fours with Mr. Glover's case. Indeed, as the district court noted in its order dismissing Mr. Glover's Section 2255 motion, the Government "concede[d] that *Wilson* would be controlling as to the grouping of Glover's conspiracy, kickback and money laundering offenses." J.A. 44. Federal Rule of Appellate Procedure 28(j) expressly allows for submitting such supplemental authority after written briefing has concluded. Mr. Glover's counsel was obligated to learn of the *Wilson* decision and inform the court of appeals of its relevance to Mr. Glover's case. Given the dispositive nature of the *Wilson* decision to Glover's sentence, the Government misses the mark in contending that the Seventh Circuit would not consider *Wilson* and correct Mr. Glover's faulty sentence.[14]

Glover's counsel initially moved to withdraw as counsel on appeal. This motion was denied by the circuit court. Counsel then moved on at least four occasions for an extension of time before finally filing Mr. Glover's appellate brief. Then, despite the fact that Mr. Glover was convicted in a three-week trial involving complex labor racketeering charges, Mr. Glover's attorney raised only two issues on appeal. Moreover, much of the counsel's brief consists of simply quoting from transcripts. J.A. 120-24.

[14] *See, e.g., DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 326 (5th Cir. 1977) (considering issue raised by party in supplemental authority after oral argument; "we are unwilling to ignore this important clarification of the law, and perpetuate incorrect law"); *United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994) (considering issue raised in supplemental authority "to prevent 'substantial inequity'"); *see also Holland v. McGinnis*, 963 F.2d 1044, 1057 (7th Cir. 1992) ("Of course, the state may advance new grounds if they arise after briefing."); *United States v. Compton*, 82 F.3d 179, 183-84, n.10 (7th Cir. 1996) (addressing controlling case presented as supplemental authority after briefing); *Gen. Accident Ins. Co. of Am. v. Gonzalez*, 86 F.3d 673, 675 & n.2 (7th Cir. 1996) (same).

2. *Wilson Argument.* The Government also argues that it would be an impermissible "windfall" for petitioner to rely on the Seventh Circuit's holding in *Wilson* that grouping is required because *Wilson* was wrongly decided. Resp. Br. 38-44. Although careful never to say so directly, the Government is asking this Court to overrule the Seventh Circuit's interpretation, as well as the interpretation of a number of other circuits, of § 3D1.2 of the Guidelines.[15]

These circuit court decisions are soundly reasoned. Indeed, Mr. Glover would qualify for grouping under three of the subsections of Guidelines § 3D1.2. Because the money laundering was part of the common scheme to conceal the illegal kickbacks, these offenses were aimed at the same victim and therefore qualify for grouping under § 3D1.2(b). *See, e.g., Wilson*, 98 F.3d at 283-84 ("there is intuitive force to the argument that the victim of the fraud is also a victim of the transaction designed to hide or 'cleanse' the funds of which she was defrauded."); *Leonard*, 61 F.3d at 1186 ("the group of targeted victims became the victim of the money laundering activity as well as the fraud scheme . . . [T]he money laundering and fraud constituted part of the same continuing common criminal endeavor").[16] The kickback and

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The only Seventh Circuit case cited by the Government involves a finding of waiver where a party neglected to raise an issue anywhere in its briefs. Resp. Br. 34 (citing *Durham v. Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999)). *Durham*, however, does not speak to the instant situation where a dispositive ruling on an issue affecting an individual's liberty is issued after briefing but while the case is still pending.

[15] *See, e.g., Wilson*, 98 F.3d at 281, *United States v. Emerson*, 128 F.3d 557, 564-66 (7th Cir. 1997), *United States v. Cusumano*, 943 F.2d 305, 312-13 (3d Cir. 1991); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995); *United States v. Adams*, 74 F. 3d 1093, 1102 n.12 (11th Cir. 1996); *United States v. Walker*, 112 F.3d 163, 166-67 (4th Cir. 1997).

[16] *See also United States v. Cusumano*, 943 F.2d at 313 (finding grouping under § 3D1.2(b); "The victim of all offenses in this case was

money laundering offenses also should be grouped under subsection (c) in order to avoid double counting; otherwise, the same $250,000 is counted for calculating the kickback offense level and the money laundering offense level.[17]

The kickback and money laundering offenses also could qualify for grouping under § 3D1.2(d). As the Government itself admits, grouping of money laundering and labor racketeering offenses "might seem appropriate" under the plain language of subsection (d) "because the guidelines for both offenses measure some part of the respective harms in monetary terms." Resp. Br. 42. The Government also must concede that subsection (d) contains a list of offenses "to be grouped" under its provision, and both kickbacks and money laundering are included on that list. *Id.* 42-43. The Government offers no convincing rationale as to why these clear statements by the Sentencing Commission should not end the inquiry. The kickback scheme and the money laundering engaged in as part of the kickback scheme "are 'of the same general type', and the offense level for each 'is determined largely on the basis of the total amount of harm or loss' as subsection (d) envisions." *Wilson*, 98 F.3d at 283 (quoting § 3D1.2(d) and Application Note 6). As a result,

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the [Pension] Fund and its beneficiaries. The evidence demonstrated that the unlawful kickbacks, the embezzlement, the conspiracy, the travel act violations and the money laundering were all part of one overall scheme to obtain money from the Fund and to convert it to the use of [defendants].").

[17] *See* U.S. Sentencing Commission Staff, FEDERAL SENTENCING GUIDELINES MANUAL (1995 ed.) Appendix E, "Questions Most Frequently Asked About the Sentencing Guidelines," Question 65 (concluding that in most cases it was appropriate to group money laundering offenses and drug distribution offenses—offenses far more dissimilar than kickbacks and attendant money laundering—under §§ 3D1.2(a)-(c)).

these offenses should be grouped together under subsection (d).[18]

3. *Recalculation Argument.* The Government also engages in an elaborate Sentencing Guidelines recalculation to show, in its estimation, that Mr. Glover suffered no prejudice because he would have received an even longer sentence if grouping occurred under *Wilson*. Resp. Br. 44-47. The Government attempted this very recalculation on remand in *Wilson*, and was emphatically rebuffed by the Seventh Circuit. *Wilson II*, 131 F.3d at 1250. In *Wilson II*, the court of appeals ruled that the Government's proposed sentencing 'changes' on remand—the same recalculations that it proposes here—should have been raised during the original sentencing. According to *Wilson II*, the Government "could have but did not" make these Guidelines arguments in the original sentencing proceedings, and thereby "waived any reliance" on them. *Id.* at 1253. Mr. Glover's case is identical. In fact, the Probation Office's presentence report regarding Mr. Glover grouped the kickback and money laundering offenses, so the Government had before it the precise calculation of Mr. Glover's sentence based upon the grouping of these offenses in August 1995. J.A. 56-83. Yet, the Government did not object on these grounds. Thus, there is no need for the Government's elaborate recalculation; the Probation Office's presentence report already performed this calculation which upon adoption by the district court at sentencing became the law of the case. Although the

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[18] *See also* Sentencing Guidelines §3D1.2, Application Note 6 ("Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes . . . and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together . . . [Offenses] are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. . . . The 'same general type' of offense is to be construed broadly . . .").

Government "had every incentive" at the time of sentencing to make the Guidelines arguments on which its new recalculation is based, *Wilson II*, 131 F.3d at 1253, it did not do so. Accordingly, under *Wilson II*, the Government's failure to make these arguments during the original sentencing of Mr. Glover prevents it from reopening these sentencing determinations years later.[19]

As the Government tacitly acknowledges, the Seventh Circuit's waiver holding in *Wilson II* precludes the Government's theory that grouping would lead to a longer recalculated sentence for Mr. Glover. Resp. Br. 47 n. 19. Once again, the Government is compelled to argue that this Court should overrule binding Seventh Circuit precedent. The Government, however, fails to set forth any error on the part of the Seventh Circuit or any explanation as to what makes this procedural issue worthy of review by this Court.

CONCLUSION

Accordingly, the judgment of the court of appeals should be reversed and the case be remanded to the court of appeals.

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[19] The Government's recalculation also is incorrect. If the offenses are grouped under subsections (a) through (c), there is no aggregating of dollar amounts and, therefore, the sentencing range would be decreased and not increased. Even if the offenses are grouped under subsection (d), the Government is mistaken in its inclusion of the entire $1.8 million in commissions as part of the "value of the funds" used for calculating the money laundering offense level. This would be misleading and factually inaccurate (as well as doublecounting) since only $250,000 of $1.8 million was actually 'laundered.' Consequently, the probation office only used the $250,000 in its report when performing this calculation and arriving at a lower offense level. J.A. 67.

In addition, the Government did not object to this finding in the presentence report, and it was so adopted by the district court. J.A. 93. The Government did not claim as an alternate basis for affirmance in the court of appeals that the finding was clearly erroneous. The suggestion that this Court should reconsider this point now, for the first time, should be categorically rejected.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-4021

PAUL L. GLOVER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 97 C 8382—William T. Hart, *Judge*.

BRIEF AND APPENDIX OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Petitioner-Appellant is complete and correct.

ISSUE PRESENTED FOR REVIEW

Whether the potential effect on Glover's sentence of his attorneys' claimed deficient performance can satisfy the prejudice component of an ineffective assistance of counsel claim.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Following a jury trial, Petitioner-Appellant Paul L. Glover was convicted of one count of a conspiracy in violation of 18 U.S.C. § 1962(d) (RICO); eleven counts of soliciting and receiving kickbacks in violation 18 U.S.C. § 1954; two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i); and four counts of tax evasion in violation of 26 U.S.C. § 7206. On September 21, 1995, Glover "was sentenced to concurrent terms of incarceration with the longest term being 84 months." Op. at 1.[1] Glover's conviction and sentence were affirmed on direct appeal in which he was represented by the same attorneys who represented him at trial. *United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996).

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[1] References in this brief are as follows:

R. - Original Record on Appeal
S.Tr. - September 21, 1995 Sentencing Transcript
Br. - Glover's Brief on Appeal
Op. - September 3, 1998 District Court Memorandum Opinion and Order (Because the copy of the district court's September 3, 1998 Memorandum and Order in Appellant's Appendix only contains four pages of the district court's eight page opinion, a full copy of the district court's opinion is included in an Appendix to this brief.)

On November 26, 1997, Glover filed a Motion to Correct Sentence pursuant to 28 U.S.C. § 2255. R. 1. The district court denied his petition in a memorandum opinion that was entered on the docket on September 3, 1998. R. 7-9. On October 19, 1998, Glover filed a notice of appeal. R. 10. On October 22, 1998, the district court certified the appealability of Glover's claim of ineffective assistance of counsel. R. 13.

II. Statement of Facts

Petitioner-Appellant, Paul L. Glover, was convicted after a jury trial of the offenses of RICO conspiracy, money laundering, soliciting and receiving kickbacks, and tax evasion. In summary, Glover, formerly the Vice-President and General Counsel of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent), solicited and received kickbacks totaling approximately $326,875 as a result of investments he helped arrange from the Union's pension and health and welfare funds. Glover also arranged for the laundering of approximately $150,000 of these proceeds to conceal their illegal source and reported none of the proceeds from these kickbacks on his federal income tax returns. *Glover*, 101 F.3d at 1185-88.

Glover's Presentence Investigation Report ["PIR"] recommended that the money laundering and kickback offenses be grouped together. S.Tr. at 3. At the sentencing hearing, the United States argued that Glover's money laundering and kickback offenses should be grouped separately under the Sentencing Guidelines. S.Tr. at 2-3. Glover's counsel objected to the separate grouping of the money laundering and kickback offenses and argued that they should be grouped together as they had been in the PIR. In response to the district court's comment that the "probation officer [had] grouped all of the offenses together rather than separately," Glover's counsel responded:

> No, your Honor. I just think it's appropriate. It's one common—if the jury was and did believe that it was one joint effort by Johnson and Mr. Glover. I think that all of the transactions that the government asserts should be considered individually ought not be considered individually. I think there [sic] appropriately grouped [referring to their being grouped together in the PIR].
>
> S.Tr. at 3-4.

The district court denied Glover's objection and held that the money laundering and kickback offenses should be grouped separately. S.Tr. at 4. In so holding, the district court noted that the Seventh Circuit had not yet ruled on the issue of the grouping of money laundering and kickback offenses, but that other circuits, including the First, Fourth, Ninth, Tenth and Eleventh "had held in similar fact situations that they should not be grouped." S.Tr. at 4. *See. e.g., United States v. Lombardi*, 5 F.3d 568, 570-71 (1st Cir. 1993) (grouping money laundering separately from conspiracy/mail fraud); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (grouping money laundering separately from wire fraud); *United States v. Smith*, 13 F.3d 1421, 1428 (10th Cir.) (grouping money laundering separately from mail fraud) , *cert. denied*, 513 U.S. 878 (1994). As a result of this separate grouping, Glover's total offense level was calculated as 28. If the offenses had been grouped together, Glover's total offense level would have been 26. Op. at 2.

Glover appealed his sentence, but did not appeal the separate grouping of the money laundering and kickback offenses. *United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996). On October 17, 1996, after Glover's appeal before this Court had been argued, this Court held in *United States v. Wilson*, 98 F.3d 281, 284 (7th Cir. 1996), that money laundering and mail fraud counts should be grouped together pursuant to U.S.S.G. § 3D1.2(d).

On November 26, 1997, Glover filed a *pro se* petition in the district court, pursuant to 28 U.S.C. § 2255, claiming that his attorneys were ineffective both at his sentencing and on appeal. R. 1. Glover claimed, among other things, that his counsel had neither made any argument opposing the United States' motion to group the money laundering and kickback offenses separately nor appealed from the district court's grouping decision. R. 1 at 23-26. The United States filed a response opposing Glover's § 2255 Petition (R. 5), and Glover filed a reply to the United States' response in which he further developed his arguments. R. 6.

The district court denied Glover's petition on September 3, 1998. In a written opinion, the district court observed that in order for a defendant to prove his attorney's ineffectiveness, "it must be shown both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." Op. at 4-5 (citing *Melvin v. United States*, 78 F.3d 327, 329 (7th Cir.), *cert. denied* , 117 S. Ct. 384 (1996)).

With respect to Glover's claim that his attorneys' ineffectiveness had prejudiced him, the district court concluded that Glover had not suffered prejudice. The district court observed that

> [a]lt the time of sentencing, it was determined that Glover's total offense level was 28 and his criminal history was I for a guidelines range of 78 to 97 months. He was sentenced to 84 months, incarceration. Had the money laundering been grouped with the conspiracy and kickback offenses, the total offense level would have been 26 and the guideline range would have been 63 to 78 months. Glover's sentence would have had to have been reduced by at least 6 months and possibly up to 21 months, though it is unlikely that he would have been sentenced to the low end of the 63-78 month range since he was not sentenced on the low end of the 78-97 month range.

Op. at 2 (footnotes omitted). The district court also noted that "[t]he tax offenses could have been a basis for not sentencing on the low end. *See* U. S. S. G. § 3D1. 4 (c)." Op. at 3 n.2. The district court held that the two-level increase was not a "significant change that would satisfy the prejudice requirement." Op. at 5. Because Glover had not satisfied the prejudice requirement, the district court did not consider the issue of his counsels' deficient performance. Op. at 4.

SUMMARY OF ARGUMENT

To demonstrate ineffective assistance of counsel, Glover must show both that his counsels' performance was deficient and that this deficiency prejudiced him. In the sentencing context, prejudice may be established by showing that a defendant suffered a "significant" increase in his sentence as result of his counsel's performance. Glover's counsels' alleged deficiency resulted in Glover's Sentencing Guidelines total offense level being determined to be 28 rather than 26. This two-level change is not sufficient to establish that Glover suffered an increase sufficient to establish "significant" prejudice. Thus, the district court correctly denied Glover's Motion to Correct Sentence.

ARGUMENT

I. Standard of Review

> Upon appeal from a district court's denial of a § 2255 motion, [the Court of Appeals] review[s] questions of law *de novo* and factual questions for clear error. *Bond v. United States*, 77 F.3d 1009, 1012 (7th Cir.), ... A defendant's ineffective assistance of counsel claim is a mixed question of law and fact and is also reviewed *de novo*. *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

Stoia v. United States, 109 F.3d 392, 395 (7th Cir. 1997).

II. The Potential Effect on Glover's Sentence of His Attorneys' Claimed Deficient Performance Does Not Satisfy the Prejudice Component of an Ineffective Assistance of Counsel Claim.

Glover argues that the district court erred in denying his petition filed pursuant to 28 U.S.C. § 2255, in which he alleged that he received ineffective assistance of counsel at the sentencing phase of his case. Glover makes three basic arguments in support of his position: First, that this Court's opinions in *Durrive v. United States*, 4 F.3d 548 (7th Cir. 1993), and *Martin v. United States*, 109 F.3d 1177 (7th Cir. 1996) (*en banc*) , *cert. denied*, 118 S. Ct. 335 (1997), were wrongly decided; second, that Glover's case falls within an "exception" to the *Durrive* and *Martin* holdings; and third, that even under the *Durrive* and *Martin* holdings, Glover has established prejudice. Each of Glover's arguments must fail.

A. *Durrive* and *Martin* Were Not Wrongly Decided.

Glover first argues that *Durrive* and *Martin* were wrongly decided. Br. at 8-13. Glover raises a myriad of subarguments in support of this proposition. Of these, Glover's most salient arguments are that the "'significant' prejudice rule" and "rule of proportionality" in *Durrive* and *Martin* are in conflict with the Sentencing Guidelines, Br. at 9-11, and that the "*Durrive* and *Martin* definition of 'significant' prejudice has led to concerns within the Circuit," Br. at 10.[2] Each of Glover's arguments must fail,

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[2] Glover also argues that no other jurisdiction supports the *Durrive* and *Martin* definition of prejudice and that the *Durrive* and *Martin* holdings are mere evidence of this Court's "irritation with Section 2255 cases." Br. at 12-13. These arguments are without merit

1. Background for this Court's Holding in *Durrive* and *Martin*

Title 28, United States Code, Section 2255 permits a court to grant relief in only three instances, those in which: 1) the sentence was imposed in violation of the Constitution or the laws of the United States; 2) the court was without jurisdiction to impose such sentence; or 3) the sentence was in excess of the maximum allowed by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255. This Court has repeatedly admonished the lower courts to respect the limitations on their powers under § 2255. *See United States v. Springs*, 988 F.2d 746, 748-49 (7thCir. 1993). In *Scott v. United States*, 997 F.2d 340 (7th Cir. 1993), this Court gave a detailed explanation of the limitations on that power and emphasized that where the defendant does not meet the requirements of § 2255, not only should the district court not address the merits of the defendant's arguments, the district court lacks the power to address the merits of the defendant's arguments. *Id.* at 341.

In *Scott*, the defendant was convicted and sentenced to 57 months imprisonment. No appeal was taken. One year later, the defendant filed a § 2255 petition contending that the district court had misapplied the Sentencing Guidelines in determining his sentence. Id. The district court judge considered the merits of the defendant's argument, and conceded that he should not have increased Scott's criminal history under U.S.S.G. § 5K2.6. *Id.* The district court nonetheless declined to reduce Scott's sentence, reasoning that the same sentence was independently justified as an upward departure from the Guidelines' range. *Id.*

This Court affirmed the dismissal of the § 2255 petition, but first stated that the district court should not have addressed Scott's arguments on the merits because the judgment had become final and was not appealed. *Id.* " The district judge addressed Scott's arguments on the merits, just

as if his petition were a timely post-judgment motion for reconsideration. It is not." *Id.* at 340. This Court noted that the Sentencing Guidelines had repealed "old" Rule 35 of the Federal Rules of Criminal Procedure, effectively removing the district court's power to modify a sentence for persons sentenced under the guidelines.

> Once seven days have run, sentences said to be illegal or improvident or just plain too long are beyond the power of the district court to modify . . . . [T]he system established by the Sentencing Reform Act will be upset if litigants and judges just substitute § 2255 for the old Rule 35 and go on as if nothing has changed. Judges must respect the limitations on their power under § 2255.

Id. at 341; accord, *United States v. Mosely*, 967 F.2d 242, 243 (7th Cir. 1992) (even "blunders that would be 'Plain error' on direct appeal do not authorize collateral relief").

In *Scott*, this Court held that a claim that the district court misapplied the Sentencing Guidelines does not invoke any of the stated grounds in 28 U.S.C. § 2255 because it does not challenge the jurisdiction of the court, or assert that the judge exceeded the statutory maximum . *Scott*, 997 F.2d at 341. Furthermore, this Court held that the Sentencing Guidelines are not "laws" within the meaning of § 2255, but instead are "regulations" whose force is analogous to that of the Rules of Federal Criminal Procedure. *Id.* Accordingly, absent a "com-
plete miscarriage of justice," assertions of a misapplication of the Sentencing Guidelines provide no basis for review under § 2255. "[W]e conclude that arguments of the sort Scott proffers must be advanced on direct appeal or not at all." *Id.* at 343.

Subsequently, this Court considered whether a § 2255 claim of ineffective assistance of counsel could be satisfied by a defendant's attorney's deficient performance with

respect to the determination of the defendant's sentencing guidelines. The standards that govern a court's consideration of a claim of ineffective assistance of counsel are set forth in *Strickland v. Washington* , 466 U.S. 668 (1984). In *Strickland,* the Supreme Court established a two-part test governing claimed violations of a defendant's Sixth Amendment right to effective counsel. Under *Strickland* , a defendant has the burden of proving both that (1) "counsel's performance was deficient," *id.* at 687, and (2) "that the deficient performance prejudiced the defense," *id.*, that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

2. This Court's Holding in *Durrive* and *Martin*

In *Durrive*, this Court clarified what constitutes 'prejudice" for purposes of *Strickland*, in relation to alleged errors in sentencing. *Id.* at 549. In *Durrive*, the defendant was convicted and sentenced to 120 months imprisonment for conspiracy to distribute cocaine. *Id.* In a petition filed pursuant to 28 U.S.C. § 2255, the defendant asserted that the district court had not complied with Fed.R.Crim.P. 32. *Id.* The defendant recognized that noncompliance with a rule of procedure (*i.e.*, Rule 32) could not be raised through collateral attack. *Id.* (citing *United States v. Timmreck*, 441 U.S. 780 (1979)).

Accordingly, the defendant in *Durrive* attempted to recast the alleged violation of Rule 32 as an ineffective assistance of counsel claim. The defendant asserted that if his counsel had objected to the noncompliance with Rule 32, his sentencing range would have been 87 to 108 months, resulting in at least a 12-month reduction from the 120-month sentence the defendant received. *Id.* at 550. This Court concluded that, in relation to sentencing, only a "grave error" by counsel, that is, an error that produces a "significant" effect on the sentence,

could be deemed "prejudice" within the meaning of *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Id.*

> In order to avoid turning Strickland into an automatic rule of reversal in the non-capital context, . . . in deciding such an ineffectiveness claim, a court must determine whether there is a reasonable probability that but for the trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh.

Id. at 551 (quoting, *Spriggs v. Collins*, 993 F.2d 85, 88-89 (5th Cir. 1993)). This Court then held that the defendant could not establish "prejudice" under *Strickland* because, even if his counsel had been deficient, the 12 to 22 month potential difference in his sentence was not a "significant" difference. *Id.*; *Spriggs*, 993 F.2d at 90.

The *Durrive* court was guided by the reasoning of the Fifth Circuit in the *Spriggs* case in defining what constitutes a "significant" effect on sentencing. In *Spriggs*, the defendant received a 35-year sentence (out of a possible 99-year sentence) in state court for murder. Spriggs, 993 F.2d at 87. The defendant filed a petition pursuant to 28 U.S.C. § 2254 alleging that his counsel had "failed to object to erroneous information in [the] pre-sentence investigation report used by the trial court during sentencing." *Id.* Since *Lockhart* requires in a capital case that "prejudice" be appreciable before relief is warranted, the Fifth Circuit found that in non-capital cases, counsel's omissions must cause a "significant" increase in the defendant's sentence, to render it "unreliable or . . . fundamentally unfair," and therefore establish "prejudice" within the meaning of *Lockhart*. *Id.* The Fifth Circuit found that counsel's actions were deficient, but held that the defendant had suffered no "prejudice" sufficient to satisfy the *Strickland* standard. *Id.* at 90.

The holding in *Durrive* was reaffirmed in *Martin* in a rehearing *en banc*. In *Martin* , the defendant claimed that his attorney's ineffective assistance had cost him "about a single criminal-history level (equivalent to two offense levels)." *Id.* at 1178. The *Martin* court rejected his claim, finding that the defendant had failed to demonstrate the *Strickland* "prejudice" prong. *Id.*"

In *Martin*, this Court first noted that, as held in *Scott*, *supra*, in the absence of a "fundamental miscarriage of justice," an "argument based on the Sentencing Guidelines must be raised on direct appeal or not at all." *Id.* The defendant in *Martin* tried to get around this by claiming that the Sentencing Guidelines error in his case was based upon his attorney's ineffective assistance of counsel. In particular, Martin claimed that his appellate attorney had failed to appeal from the district court's error in assigning him a criminal history category of IV instead of his deserved III. *Id.* at 1179. But this Court rejected this maneuver, citing the holding in *Durrive* that "to satisfy the 'prejudice' component of *Strickland*, a person who complains about his sentence must demonstrate that counsel's deficient performance led to a 'significant' increase in the sentence." *Id.*

> Although we recognized in *Durrive* that any extra time in prison is significant from the defendant's perspective, we adopted a rule of proportionality: the sort of increase produced by a few levels' difference in sentencing calculations cannot be raised indirectly on collateral attack by complaining about counsel's work. A few levels is exactly what Martin wants us to examine. Actually, his complaint is about a single criminal-history level (equivalent to two offense levels). Such an argument is barred by *Scott* when presented directly, and by *Durrive* when presented as an attack on counsel's performance.

Id.

3. Response to Glover's Arguments

First, Glover argues that this Court's "'significant' prejudice rule" and "Rule of Proportionality" in *Durrive* and *Martin* are in conflict with the Sentencing Guidelines. Br. at 9-11. With respect to this Court's "significant" prejudice test, Glover argues that because the Sentencing Guidelines place specific limits on a sentencing court's discretion, *any* offense level change in a defendant's sentence is "significant." Br. at 10.

Glover's argument must fail because it confuses what is a "significant" change for Sentencing Guidelines purposes with what is a "significant" change for Constitutional purposes. Glover's observation that for guideline calculation purposes, any offense level change may be "significant," is correct. A sentencing court's discretion is strictly limited by the Sentencing Guidelines, and thus, a sentencing court's decision as to offense level designation is significant in that it is subject to direct review.

But the constitutional test of "significance" is different. Glover's § 2255 motion is based upon the claim that his sentence was imposed in violation of the Constitution, in particular, his Sixth Amendment right to counsel. "The Constitution permits courts substantial leeway in the procedures used to arrive at a sentence." *Durrive*, 4 F.3d at 549-50 (citing *United States v. Dunningan*, 507 U.S. 87, 94-98 (1993)); *United States v. Grayson*, 438 U.S. 41 (1978); *Williams v. Oklahoma*, 358 U.S. 576 (1959); *Williams v. New York*, 337 U.S. 241 (1949).

Under *Lockhart*, the Constitutional test is whether counsel's deficiencies "render[ed] the result . . . unreliable or the proceeding fundamentally unfair." *Id.* at 372. For this reason, as recognized in *Spriggs*, 993 F.2d at 88-89, and *Durrive*, 4 F.3d at 551, the Constitutional test of "'significance' is a relative term." Therefore, it would be

inappropriate to consider *any* change in a defendant's sentencing guidelines to be a "significant" change for Constitutional purposes, as Glover proposes.

Glover's attack on the "Rule of Proportionality" he finds in *Durrive* and *Martin* is likewise flawed. Glover claims that *Durrive* and *Martin* countenance changes in a defendant's offense level of up to six levels or "potentially a 50 per cent incorrect increase in a defendant's sentence!" Br. at 11. But Glover seriously misreads *Durrive* and *Martin*. In *Durrive*, this Court found an adjustment of two or three levels not to be "significant," *Durrive*, 4 F.3d at 551, and in *Martin*, this Court found an adjustment of one criminal history category, the equivalent of two offense levels, not to be "significant," *Martin*, 109 F.3d at 1178-79. Neither portends the accepted level of error Glover suggests.

Second, Glover argues that the holdings of *Durrive* and *Martin* have "led to concerns within the Circuit." Br. at 11. But Glover is unable to document any such widespread concern. Glover's only support for this proposition comes from the dissent in *Martin* and the district court's observations in this case. *Id.* Contrary to Glover's allegations, in neither this case nor most others have district courts had problems in applying the *Durrive* and *Martin* test. Op. at 6-7; *see, e.g., Unger v. United States*, 8 F. Supp. 2d 1151, 1155 (E.D.Wis. 1998), *United States v. Lloyd*, 983 F. Supp. 738, 746-447 (N.D. Ill. 1997), *Gonzales v. United States*, 967 F. Supp. 326, 332-33 (N.D. Ill. 1997), *Davis v. United States*, 1998 WL 142369 *3 (N.D. Ill.), *United States v. Allen*, 1997 WL 445823 * 1 (N.D. Ill); *but see, e.g., United States v. Tai*, 972 F. Supp. 434, 438 n.4 (N.D. Ill. 1997).

B. Glover Does Not Fall Within Any Exception to *Durrive* and *Martin*.

Glover next argues that his case falls within an "exception" to the *Durrive* and *Martin* holdings. In making this argument,

Glover relies upon dicta in *Spriggs*. In *Spriggs*, the court noted

> one foreseeable exception to this requirement [showing of "significant" prejudice] would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing—such as an automatic increase for a "career" offender or an enhancement for use of a handgun during a felony—which would have not occurred but for counsel's error.

Id. at 88 n.4. Glover's argument must fail because this Court has never, for good reason, adopted this suggested "exception."

In neither *Durrive* nor *Martin*, nor any other case addressing this issue, has this Court adopted the "foreseeable exception," suggested in *Spriggs*. Indeed, in application, this Court has rejected the *Spriggs* exception. In *Martin*, this Court specifically applied the "significant" prejudice test in a case that involved a specific guidelines enhancement in sentencing, *i.e.*, an increase in Martin's criminal history category from III to IV, which defendant argued was a result of counsel's error, *i.e.*, appellate counsel's failure to appeal from the district court's designation. *Martin*, 109 F.3d at 1179. In *Durrive*, this Court applied the "significant" prejudice test where the defendant alleged that the court's specific failure to find that the quantity of cocaine involved was less than two kilograms increased his offense level from 26 to 28. *Durrive*, 4 F.3d at 551. Thus, where presented with factual situations in which Glover suggests the *Spriggs* "exception" should apply, this Court has found no "exception." Instead, this Court's only favorable mention of the Spriggs "exception" is in the Martin dissent. *Martin*, 109 F.3d at 1182.

It is for good reason that this Court has not adopted the "exception" suggested by *Spriggs*. In practice, this

"exception" would swallow the rule. There is very little discretion for a sentencing court within the sentencing guidelines. Most all complaints regarding sentencing guidelines calculations involve specific determinations resulting in "demonstrable enhancements." For this reason, under the suggested *Spriggs* "exception, " if a defendant could base his claim of prejudice on the application of any specific sentencing guideline, he would not need to meet the "significant" prejudice test. Very few sentencing guidelines disputes would not fall within this "exception."

C. Glover Has Not Established "Significant" Prejudice as Required by *Durrive* and *Martin*.

Finally, Glover argues that he has suffered "significant" prejudice as required by *Durrive* and *Martin*. Glover claims that the "17.9% increase in his sentence [from 69 months to 84 months] must be considered 'significant' in the context of his 84-month sentence." Br. at 14. Glover's claim must fail because the increase in his sentence parallels closely the increase found not to be "significant" in *Durrive*.

The district court calculated Glover's total offense level as 28, Criminal History Category I (78 to 97 months) and sentenced Glover to 84 months incarceration. Glover claims that his total offense level should have been 26, Criminal History Category I (63 to 78 months). If so, Glover's sentence would have been reduced by between 6 and 21 months. If, as the district court suggests, Glover's offense level had been 26, and he had been sentenced to "6 [months] above the low end as was his original sentence," Op. at 7 n.8, Glover would have received a sentence of 69 months incarceration, or a reduction of 15 months. This potential change in Glover's sentence is similar to the reduction approved in *Durrive*.

In *Durrive*, the district court found the defendant's guideline range to be from 108 to 135 months, and the

defendant was sentenced to 120 months incarceration. Under the "correct" application of the guidelines, the defendant's guideline range would have been from 87 to 108 months incarceration. *Durrive*, 4 F.3d at 551. This would have resulted in a potential adjustment of between 10% (if defendant were resentenced to 108 months) and 18.3% (if defendant were sentenced to 98 months, as approved in *Durrive*, *id.*). The *Durrive* Court found that a sentence of 98 months (22 months less) on resentencing would not have been a "significant" difference. *Id.* A sentence of 98 months incarceration would have resulted in an adjustment of 18.3%.

In this case, the district court found Glover's guideline range to be from 78 to 97 months, and sentenced him to 84 months incarceration. Under the "correct" application of the guidelines, Glover's guideline range would have been from 63 to 78 months incarceration. This would have resulted in a potential adjustment of between *7.1%* (if Glover were resentenced to 78 months) and *25%* (if Glover were resentenced to 63 months) (compared with between *10%* and *18.3%* approved in Durrive). If, as the district court suggested, Glover were resentenced to 69 months (like his original sentence, 6 months above the low end), his resentence (*15* months less, compared with the 22 months less approved in *Durrive*) would have resulted in an adjustment of *17.9%* (compared with the 18.3% adjustment approved in *Durrive*). In all respects, the increase in his sentence of which Glover complains is similar to the increase found in *Durrive* not to constitute "significant" prejudice. Accordingly, as in *Durrive*, Glover did not suffer sufficient prejudice from his attorneys' alleged deficiency to warrant relief under § 2255.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the district court's order denying Glover's § 2255 petition be affirmed.

Respectfully submitted,

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